No. 12785

United States
COURT OF APPEALS
for the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as FARMERS AUTOMOBILE INTER INSURANCE EXCHANGE,
Appellant (Defendant),

vs.

LOUISE K. HOLM,
Respondent (Plaintiff).

Appeal from the United States District Court for the District of Oregon.

Honorable Claude C. McColloch, Judge.

RESPONDENT'S BRIEF

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STEVENS-NESS LAW PUB. CO., PORTLAND 4-51

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RESPONDENT'S STATEMENT OF THE CASE

This is an action brought on an automobile insurance policy issued by the appellant. The respondent is a judgment debtor of Elmer Sondenaa alleged by respondent to be insured under said

policy, said judgment arising out of a personal injury caused by said Sondenaa to the respondent on October 3, 1948.

The policy (Exhibit 4) herein involved was issued by the appellant in 1938 to one Von Borstel, father-in-law of the judgment debtor, Sondenaa. The coverage was changed in 1942 by endorsement to cover the automobile involved in the accident. The premiums were paid on this policy to and including November 18, 1948, and thereafter, on or about November 9, 1948, upon being billed by appellant, an additional six months premium was paid (Exhibit 5).

On July 25, 1948 Von Borstel transferred title to the automobile to his daughter, Helen Sondenaa, and a short time prior thereto inquired of one William Lawrence, district agent of the appellant (Tr. pp. 119, 120 and 149), as to the procedure to transfer the policy to his daughter, Mrs. Sondenaa. Lawrence advised Von Borstel that his daughter should sign the policy either with him or the agent near her home but in any event, "being a transaction within the family, as long as the premiums were paid on this policy, that the policy would cover." (Tr. pp. 63, 64).

The Sondenaas attempted to locate an agency of appellant near their home at Toledo, Oregon, after delivery of the automobile and the policy. On October 3, 1948, returning from the residence of Von Borstel at Kent, Oregon, which is some 300

miles from the home of the Sondenaas, the injury giving rise to the action and the judgment in State Court occurred.

On October 5, 1948 (Tr. p. 91), Sondenaa, the judgment debtor, notified the appellant of the accident (Ex. 15) giving the facts and the policy number, and the appellant, after making some cursory search of its records, did nothing (Tr. pp. 134, 135), the notice of the accident having been received in the office of the appellant about October 8, 1948 (Ex. 22). More than a month later after being billed by appellant another premium was paid (Ex. 5) before any controversy had arisen as to whether the appellant would fulfill its obligation under the terms of the policy. This premium was retained by appellant and has never been refunded nor offered to be refunded.

As a result of a phone call in November of 1948 according to the appellant's witness Porth, appellant's assistant Northwest branch claims manager, who placed the date at November 10, 1948 (Tr. p. 135), an investigation was undertaken. On November 10, 1948, appellant's adjuster Patterson obtained statements from Mr. Sondenaa (Ex. 12) at which time Patterson also saw the automobile certificate of title (Tr. pp. 93, 94). Thereafter on November 13, 1948 appellant obtained two statements from Mr. Von Borstel (Ex. 13 and 14) and on November 18, 1948, appellant obtained statements from Mrs. Sondenaa (Ex. 16). On November

17, 1948, a certificate of financial responsibility (Ex. 28) was filed by the appellant pursuant to the statutes of the State of Oregon setting forth that the appellant carried insurance covering the accident. The action in the state court (Ex. 24) was filed more than a month later and upon the complaint and summons being forwarded to the appellant for defense of the said action under the terms of the policy, the Sondenaas and Von Borstel were informed that appellant assumed no responsibility and would offer no protection to them nor any of them (Ex. 6, 7, 8 and 9). Trial resulted in a judgment in favor of the respondent in the sum of $12,708.45 and costs and by reason of appellant's failure to pay this judgment, this litigation ensued.

QUESTIONS INVOLVED

1. Were the representations of the appellant to the assured Von Borstel, that so long as the premiums were paid on the policy the transaction being within the family, sufficient to constitute an estoppel?

2. Was the acceptance and retention by the appellant of the premium paid subsequent to the loss, sufficient to constitute a ratification of the transfer of the policy?

3. Was the filing of the certificate of financial responsibility as required by the Oregon law sufficient to constitute a ratification of the transfer of the policy and to create absolute liability on the part of appellant?

4. Was the acceptance of the premium and retention thereof by appellant and the filing of the certificate of financial responsibility as required by the Oregon law sufficient to constitute a ratification of the policy and to create absolute liability on the part of appellant?

I.

The Representations of the Appellant to the Assured Von Borstel That So Long as the Premiums Were Paid on the Policy the Transaction Being Within the Family Were Sufficient to Constitute an Estoppel.

ARGUMENT

In Von Borstel's interview with the district agent Lawrence, appellant's agent with authority "to service policy-holders" (Tr. p. 151), the appellant was advised of the facts and circumstances concerning the proposed transaction by Von Borstel. The appellant, in giving to Von Borstel the information, that so long as the premiums were paid on this policy, the policy would cover, the appellant had every reason to believe that Von Borstel and the Sondenaas would rely upon the information so given. It is evident from the testimony (Tr. pp. 90 and 112) that Von Borstel and the Sondenaas did so rely upon the representations made and that the appellant is, therefore, estopped to deny its consent to the transfer of the policy from Von Borstel to his daughter, Helen Sondenaa.

Whatever may be the rule in some other jurisdictions, the Supreme Court has announced the applicable rule in the State of Oregon in the case of **Fagg vs. Massachusetts Bonding and Insurance Co.,** 142 Or. 358, 19 Pac. (2d) 413. That case in-

volved an action by the judgment creditor of one Mrs. Clarke Day, wife of the owner of the automobile. The policy had been issued in the name of one King, the previous owner. The Court found that the agent of the insurer who, in the Fagg case, was an insurance brokerage company rather than the company's own representative as in the case at bar, had upon inquiry advised the said Day that the assignment of the policy was not necessary nor the consent of the company to such assignment. Upon testimony of the husband of the judgment debtor that, had he been advised to the contrary, he would have procured other insurance, the Court in affirming a judgment for the plaintiff made the following statement:

> "The distinction between waiver and estoppel is clearly set forth in Kimball v. Horticultural Fire Relief, 79 Or. 133, 154 Pac. 578, in an opinion citing many precedents and quoting with approval the following excerpt from Dwelling House Insurance Company v. Dowdall, 55 Ill. App. 622:
>
> " 'The stipulation in the policy that no agent or other representative of the company shall have power to waive any provisions or condition of the policy may be effective as against an alleged waiver by agreement or contract with an agent or representative, but has no application when the law declares a waiver by estoppel, because of the acts of the company through its agent or representative. Such estoppels do not rest upon the power, or lack of power, of the agent to change the provisions of the policy or waive any of its agreements, but arise in law, because of the acts of the

company through its agent, acting in the scope of his apparent power as its representative.'

"The question of whether or not the defendant was estopped by the acts of its agent from claiming that the insurance policy issued to King did not cover Mrs. Clarke Day, was, in view of the evidence in the case, properly submitted to the jury."

The same principle was announced in **Mercer v. Germania Insurance Company,** 88 Or. 410, 171 Pac. 412, page 414:

"We find here all of the elements of an estoppel within the rule announced in Page v. Smith, 13 Or. 410, 414, 10 Pac. 833, and Oregon v. Portland General Electric Co., 52 Or. 502, 528, 95 Pac. 722, 98 Pac. 160. The policy written in 1915 was paid; plaintiff was informed it was all right. This statement was made to a woman ignorant of the truth; it was made by an underwriter of large experience who knew the facts. He must have intended that plaintiff should act upon it and there is evidence that she did rely upon it to her injury. Defendant should not be permitted to escape liability on this policy on the ground that it named A. G. Mercer as the insured."

In **Kimball v. Horticultural Fire Relief,** 79 Or. 133, 154 Pac. 578, the Court recognizing the principle announced in **Insurance Co. v. Eggleston,** 96 U.S. 572, 577, 24 L. Ed. 841, quoted the following excerpt from Mr. Justice Bradley's opinion:

"Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his

> policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

Appellant in its brief attempts to make a distinction between the forfeiture for condition broken and the question of extending coverage to one other than the named assured.

In the case of **Virginia Auto Mutual Insurance Company v. Brillhart,** 46 S.E. (2d) 380 (Va.), the facts were that the agent of the insurance company, Miss Showalter, prepared documents for the transfer of an automobile on behalf of the buyer and the seller and not on behalf of the insurance company, upon which the insurance company through her had issued a policy of liability insurance. Upon a statement by the seller of the car, Huffman, the named insured, to the buyer of the car, Owens, that he would let the policy go with the car, and without comment from the agent, Miss Showalter whatever, a judgment obtained by the judgment creditor against the buyer was upheld. The Court made the following statement:

> "To Huffman and Owens she, Miss Showalter, was the insurance company and their only contact was with her. They had no knowledge of any limitations of her authority. So far as they knew she had full power and authority to protect their interests and in so doing bind her principal.

"Both men testified the conversation which they had with reference to transferring the insurance policy along with the car to Owens took place in her presence and within her hearing. While it is true that she did not take part in the conversation, she did not deny it occurred nor did she in the final analysis deny that she heard it.

"There is no claim by the insurance company that the transfer of coverage under the policy would have increased its risk or would have required a higher premium, nor does it contend that if a formal application had been made to it for that purpose, it would have withheld endorsement on the policy signifying its consent to the transfer of the coverage. . . . In short, the insurance company's position is that because the required endorsement was not actually obtained, the coverage under their policy was not extended to Owens and this although it had been paid for coverage which protected no one.

"An agent with authority actual or apparent to represent the insurer, may undoubtedly waive a forfeiture arising from unauthorized alienation of a right, title or interest in the subject matter of the insurance by consenting thereto . . . **or by telling the insured that a written approval or endorsement of consent is unnecessary . . . and a consent may be given and a waiver be effected by the agent without communication with their principal.**" (Emphasis ours)

Counsel in their brief on this problem cite the cases of **Aetna Casualty & Surety Co. v. Block** (Texas, 1942) 142 S.W. (2d) 445; **Carnes & Co. v. Employers Liability Assurance Corp.** (CA 5), 101 F. (2d) 739; **Standard Insurance Co. v. Roberts**

(CA 8, 1942), 132 F. (2d) 794; **Fidelity & Guaranty Fire Corp. v. Bilquist** (CA 9, 1938), 99 F. (2d) 333.

It will be noted that in each of the foregoing cases the Court found upon a showing that in each instance the risk attempted to be covered under the terms of the policies issued was greater and, therefore, required a higher premium.

In **Aetna Casualty & Surety Co. v. Block,** Supra, the employer had a workmen's compensation policy for employees in the drygoods business. The loss sought to be covered in the case was for injury by an employee who was engaged by the same employer in the junk business requiring a substantially higher premium rate.

In **Carnes & Co. v. Employers Liability Assurance Corp.,** Supra, an automobile insurance policy was issued to cover liability from the operation of a truck engaged in the hauling of paints, farm equipment and hardware. The loss occurred by reason of the hauling of Butane gas.

In **Fidelity & Guaranty Fire Corp. v. Bilquist,** Supra, a fire insurance policy was issued on household goods kept in a building which at the time of the issuance of the policy was used as a dwelling only. Upon subsequent use of the building as a bar, which said use required the payment of a higher rate than the policy originally issued, this Court while not giving judgment for the loss remanded the cause to the Federal District Court of

Washington for the purpose of reforming the policy as the agent knew of the change in the use of the property. In each of the above cases the risk was substantially greater and the premium substantially higher, and it is submitted, that these cases have no application in this cause as it was not contended that there was any greater risk or that a higher premium would be charged and there was no attempt to make a showing to that effect.

Appellant ~~Respondent~~ contends further that the agent Lawrence had neither the actual nor the apparent authority to bind the company in any way. It is submitted that Lawrence was an agent representing the appellant only. It was further testified to by the Northwest branch manager, appellant's witness Smith, that he, Lawrence, had the authority to write insurance, collect the premiums and service the policy holders (Tr. p. 151). In **Commonwealth Casualty Co. v. Arrigo,** 160 Md. 595, 154 Atl. 136, 77 A.L.R 1250, p. 1254, the Court makes the following statement:

> "An agent of the insurer whose duty it is to take or solicit applications for insurance, to forward such applications to the insurer for acceptance, to deliver the policy and to collect the premiums has frequently been held such an agent that knowledge as to matters affecting the risk or conditions of the policy acquired by him while performing such duties will be imputed to the insurer." **Goebel v. German Ins. Co.,** 127 Md. 419, 96 Atl. 627, 629, Ann. Cas. 1913A 850.

The respondent contends that the effect of breach of Condition 18 of Exhibit 4 is the question primarily involved in this case. It is submitted that irrespective of the rule in other jurisdictions and irrespective of whether or not this is a matter of breach of condition or a question of the extension of coverage the case of **Fagg v. Massachusetts Bonding and Insurance Co.,** Supra, is the law in Oregon under the doctrine of **Erie Railroad Co. v. Tompkins,** 304 U.S. 64, 82 Law Ed. 1188, 58 Sup. Ct. 817, 114 A.L.R. 1487.

II.

The Acceptance and Retention of the Premium Paid to the Appellant Subsequent to the Loss Constitutes Ratification of the Transfer of the Policy

ARGUMENT

In the case of **Hinkson v. Kansas City Life Insurance Co.,** 93 Or. 473, 183 Pac. 24, in an action involving insurance premiums the Court at page 490 quoting from 1 Mechem on Agency, Section 404, stated as follows:

> "At the same time, however, the principal cannot be justified in willfully closing his eyes to knowledge. He cannot remain ignorant where he can do so only through intentional obtuseness. He cannot refuse to follow leads, where his failure to do so can only be explained

upon the theory that he preferred not to know what an investigation would have disclosed. He cannot shut his eyes where he knows that irregularities have occurred. In such a case, he will either be charged with knowledge, or with a voluntary ratification with all the knowledge which he cared to have.

"The facts, moreover, may be so patent that for the principal to profess ignorance would merely be to stultify himself. They may be so obvious that the principal, as a reasonable man, cannot be heard to say that he was ignorant of them. The duty to know them may be so interwoven with the proper conduct of the principal's business that he must, as an ordinary business man, be presumed to know them. This latter rule is constantly applied in the case of the directors of corporations, especially of banks, who are ordinarily presumed to know that which the proper performance of their duties would disclose.

"It is also a settled rule of law that where an insurer has knowledge of facts entitling it to treat a policy as no longer in force, and thereafter it receives a premium on the policy, it is estopped to take advantage of the forfeiture. It cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums."

Cranston v. West Coast Life Ins. Co., 72 Or. 116, 230, 142 Pac. 762.

Allesina v. London Ins. Co., 45 Or. 441, 78 Pac. 392.

It is respectfully submitted, that at the latest, on the 11th day of October, 1948, the appellant in-

surance company had notice of the loss by reason of its receipt in the Northwest branch office of Sondenaa's letter (Ex. 15). On or about November 9, 1948, appellant cashed the premium check and retained the proceeds thereof and never refunded or sought to refund the same. Appellant takes the position, that it is entitled to retain said premium which, it is submitted, was not due and payable until November 18, 1948. Appellant should not be permitted to treat the policy valid and binding for the purpose of collecting and retaining the premiums and invalid for the purpose for which it was sold, written and paid for. It is submitted that this action even after loss bound the appellant to perform its obligations under its contract of insurance.

In the case of **Roane v. Union Pacific Life Ins. Co.,** 67 Or. 264, 135 Pac. 892, in an action brought on a note given as payment for a release of a claim for life insurance in which no policy had been issued, the insurer refused to surrender the release until some five or six months after receipt thereof and also refused to pay the note executed by its agent to procure the release. The Court at page 277 in reversing an order allowing a non-suit declared as follows:

> "The agent Howe executed the note in the name of the defendant. The release was the **fruits** of the compromise contract received by the defendant according to the evidence, the defendant undertook to disaffirm part of the compromise contract, and retain the fruits of

> it . . . to repudiate the note, but to retain the release. This the defendant could not do. When a principal wishes to disaffirm the unauthorized acts of his agent, and has knowledge of what his agent has done, he must disaffirm the contract as a whole. He cannot retain the fruits of the contract and repudiate the liabilities."

Appellant contends that no act of the appellant occurring after the loss could in any wise affect the liability of the appellant hereunder and that the rights of the parties were fixed at the time of the loss (Appellant's Brief, p. 44). This Court in the recent case of **State Farm Mutual Auto Ins. Co. v. Porter,** 186 F. (2d) 834, has taken a contrary view and it is submitted that the acts and conduct of the appellant may estop the appellant as well after loss as before.

It is respectfully submitted, that the appellant maintaining a staff of eight or nine adjusters in Eugene, Oregon (Tr. p. 144), cannot receive notice of a loss and ignore the same for more than a month without investigation, without closing its eyes to its responsibility. Appellant cannot after full knowledge treat the insurance policy as void and unenforceable and yet retain an unearned premium without such action constituting a ratification.

III.

The Filing of the Certificate of Financial Responsibility by Appellant as Required by the Oregon Law Was Sufficient to Constitute a Ratification of the Transfer of the Policy and to Create Absolute Liability on the Part of Appellant

Section 115-419, O.C.L.A., as amended by Oregon Laws 1943, Chapter 295, reads in part as follows:

> "No motor vehicle liability policy or operator's policy shall be accepted as proof of ability to respond in damages hereunder unless and until the following requirements of this section are complied with (b) Every motor vehicle policy and every operator's policy accepted as proof under this Act shall be subject to the following provisions whether or not contained therein:
>
> **"The liability of the insurance carrier shall become absolute whenever loss or damage covered by such policy occurs** and the satisfaction by the insured of a final judgment for such loss or damage shall not be a condition precedent to the right or obligation of the carrier to make payment on account of such loss or damage." (Emphasis ours)

The attention of the Court is directed to paragraph 4 of Conditions of plaintiff's Exhibit 4 reading as follows:

> "Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the motor vehicle responsibility law of any state

or province which shall be applicable with respect to any such liability arising from the use of the automobile during the policy period. . . . ."

The appellant with full knowledge of the facts filed its certificate of Financial Responsibility under the provisions of the Statute and under the terms of the policy.

In appellant's brief this matter is discussed at pages 39, 40 and 41 wherein it is contended that Exhibit 14, a report of the accident made by Von Borstel on the 13th day of November, 1948, was the procuring cause of the filing of Exhibit 28, the Certificate of Financial Responsibility. The answer to this contention will be found from an inspection of Exhibit 14 which contains on its face a stamp showing the receipt of the said Exhibit 14 in the claims make-up section of the appellant on the 19th day of November, 1948, two days after the filing of the Certificate of Financial Responsibility on the 17th day of November, 1948. Further the testimony of the witness Elmer Sondenaa (Tr. p. 94) wherein the witness testified that Patterson, the adjuster, had seen the automobile title on the 10th day of November, 1948. Patterson testified as a witness on behalf of appellant and no attempt was made to controvert this testimony of the witness Elmer Sondenaa.

The appellant certainly had full knowledge of the facts on the 17th day of November, 1948, when the Certificate of Financial Responsibility was filed

and it must have considered the policy in full force and effect for the purpose of filing the Certificate (Ex. 28) as required by the Oregon Statute and it should now be estopped to claim the policy was not effective for the purpose of protecting the Sondenaas. The very fact that appellant filed this Certificate of Financial Responsibility gave Sondenaas and Von Borstel the right to retain their driving privileges, the revocation of which would have occurred without this certificate. The purpose of the Oregon Financial Responsibility law being to keep financially irresponsible persons from operating their vehicles on Oregon Highways. In other words the appellant circumvented the provisions and the purposes of the Statute by the filing of the Certificate of Financial Responsibility and now claims that it has no liability therefor.

It is therefore submitted that under the terms of the Statute 115-419, O.C.L.A., as amended, the filing of such Certificate of Financial Responsibility (Ex. 28) created absolute liability in the appellant under the provisions of the Statute and condition 4 of the policy (Ex. 4). The position now taken by appellant that the policy was valid for the purpose of collecting and retaining the premiums and valid for the purpose of continuing the driving privileges of Sondenaa, a financially irresponsible person, but is invalid for the purpose of affording indemnity for loss is certainly inconsistent and untenable.

IV.

The Acceptance of the Premium and Retention Thereof and the Filing of the Certificate of Financial Responsibility Constitutes a Ratification of the Transfer of the Policy and Creates Absolute Liability on the Part of Appellant

The discussion of the last two previous matters fully covers the problem herein involved and at the risk of being repetitious it is briefly submitted to the Court that the appellant insurance company treated the policy in full force and effect for all purposes save and except the purposes for which the policy was purchased, issued and paid for, to protect the parties involved against liability for loss from the operation of the vehicle. The position assumed by the appellant is founded on a strained concept of indemnity insurance. To accept such concept would put Von Borstel and the Sondenaas and other assureds in a precarious and uncertain position. The acts and conduct of appellant led them to assume that they had complete insurance protection afforded by the terms of the policy. To permit the appellant to escape its contractual obligations by reason of its own misrepresentations and conduct would certainly be unjust, unfair and inequitable.

ANSWER TO APPELLANT'S SPECIFICATIONS OF ERROR

Appellant in its brief submitted to the Court seventeen Specifications of Error. With respect to Specifications 1, 2 and 3, it is submitted that the evidence is not hearsay. All of the parties concerned in the said statement were before the Court subject to cross-examination and the witnesses Von Borstel and Elmer Sondenaa and Helen Sondenaa were cross-examined about the said statement. The witness Lawrence appeared as appellant's own witness.

In Wigmore on Evidence, 3rd Ed., Vol. 5, para. 1370 and 1371, pages 50-53, the following rule is laid down:

> "The hearsay rule excludes testimonial statements not subject to cross-examination (ante para. 1362) when, therefore, a statement **has already been subject to cross examination** and is hence admitted as in the case of a deposition or testimony at a former trial—it comes in because the rule is satisfied—not because an exception to the rule is allowed. The statement may have been made before the present trial, but if it has already been subjected to proper cross examination, it has satisfied the rule and needs no exception in its favor.
>
> "The principle requiring a testing of testimonial statements by cross examination has always been understood as requiring, not necessarily an actual cross-examination but merely an opportunity to exercise the right to cross examine if desired." (Emphasis ours)

The above rule laid down by Wigmore is adopted by American Law Institute Model Code of Evidence, Rule 503, pages 231-232.

With respect to Specification of Error 2, Patterson was an agent of appellant charged with adjusting the loss and testified in behalf of the appellant concerning the alleged admission (Tr. pp. 143, 144) and the parties were all present subject to cross-examination and the evidence was clearly admissible.

It is submitted with respect to Specification of Error 4 that the facts being in dispute in this cause the question of estoppel was properly submitted to the jury. As stated in 19 Am. Jur., Estoppel, para 200, pages 855-856:

> "The rule is well established that it is a question of law for the court, in any proceedings, even though the case may involve a trial by jury, whether the facts constitute an estoppel, if the facts are undisputed. . . .
>
> "It is a firmly-settled principle that the question of the existence of an estoppel is a question to be settled by the triers of the facts . . . . where there is a dispute as to the facts involving estoppel."

Certainly there was sufficient evidence to go to the jury in this case as to whether or not an estoppel existed.

The appellant complains in Specification of Error 5 that the Court instructed the jury that if they did not believe by a preponderance of the evi-

dence Von Borstel's version of the conversation with Lawrence, that they should find for the defendant. It is submitted that the plaintiff having the burden of the proof of this issue, the instruction is fair and unbiased. The Court merely instructed the jury in order to find for the plaintiff they must find the plaintiff had sustained the burden of proof required.

The appellant complains in Specification of Error 6 that the Court submitted a one-sided version of the evidence to the jury.

A reading of the charge can hardly put the summary of the evidence quoted by the Court in the same category as the summary given in the case of **Virginia Railroad Co. v. Armentrout,** 166 F. (2d) 400, 4 A.L.R. (2d) 1064. It is submitted that the comment was fair and not one-sided or warped so that appellant could complain of being prejudiced thereby.

With respect to Specifications of Errors 7 and 8, the discussion of the questions involved herein contained in this brief covers fully the contentions of appellant as set forth in said Specifications. To enlarge upon them would be merely repetitious.

With respect to Specifications of Errors 9 to 17 inclusive the Court submitted to the jury only the question as to whether or not the version of the conversation testified to by Von Borstel was true and the jury was fairly apprised as to the burden placed upon the respondent in regard to proof of

the facts. The jury found that the conversation did take place as testified to by Von Borstel and it is submitted that the instructions fully covered the problem involved. There was no dispute as to the fact of payment of the premium and the retention thereof; there was no dispute as to the fact of the filing of the Certificate of Financial Responsibility and there was nothing in the said problems for the jury to pass on. The charge by the Court covered the situation fully and was fair and unbiased and cannot be condemned for its conciseness and brevity.

CONCLUSION

It is submitted that the acts and the conduct of appellant insurance company constitute an estoppel to deny the valid transfer of the insurance policy to the Sondenaas and to afford them protection thereunder. There is no showing of any increase in the risk; the appellant got what it bargained for and now refuses to provide that which the insureds bargained for; it has treated the policy as effective for the purpose of collection and retention of the premiums; for the further purpose of permitting a financially irresponsible person to drive an automobile on the highways of the state in circumvention of the financial responsibility law of the State of Oregon and not effective for the purpose of providing protection bought and paid for. It has agreed to indemnify this respondent under the terms of the Financial Responsibility Act and now seeks to say that it has no liability. Appellant has been fully compensated not only for the premium payable at the time of the loss but for a premium payable for a period of seven and one-half months beyond the date of the loss. It seeks to claim as a matter of right the fruits of the contract and to deny its responsibilities thereunder.

ATTORNEYS' FEES

It is submitted that respondent is entitled to attorneys' fees on this appeal under the provisions of Section 101-134, O.C.L.A., providing in part as follows:

> " . . . If attorney fees are allowed as herein provided and on appeal to the Supreme Court by the defendant the judgment is affirmed the Supreme Court shall allow to the respondent such additional sum as the Court shall adjudge reasonable as attorney fees of the respondent on such appeal."

and that the said Statute applies to policies of reciprocal insurance such as the one herein involved as determined by the Supreme Court of this state, in the case of **Whitlock v. United States Inter Insurance Association,** 138 Or. 383, 6 Pac. (2d) 1330.

It is, therefore respectfully submitted that the judgment in this cause should be affirmed with such sum as this Court deems to be reasonable as attorneys' fees in this Court.

Respectfully submitted,

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